

2014 WL 4380774 (Md.App.) (Appellate Brief)  
Maryland Court of Special Appeals.

Israel SWAREY, et ux., Appellants,  
v.  
Kerry STEPHENSON, et al., Appellees.

No. 01272.  
September Term, 2013.  
May 22, 2014.

On Appeal from the Circuit Court for St. Mary's County (Hon. David W. Densford, Judge)

**Reply Brief for Appellants**

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### \*1 I. Appellees Todd and Phillip Parriott Fail To Demonstrate A Lack Of Personal Jurisdiction In Maryland.

In the Brief of Appellees Todd and Phillip Parriott, the Parriotts make a number of arguments in support of their position that Maryland lacks jurisdiction over the dispute with Appellants, but all of their arguments fail.

First, Appellees Parriott argue that Appellants failed to allege in their Complaint that Appellees Parriott engaged in “continuous and systematic activities” that would result in personal jurisdiction in Maryland over Appellees Parriott. The extensive contacts of Appellees Todd Parriott and Phillip Parriott are enumerated in Appellants' brief on p. 21-22 and p. 33, respectively, where Appellants demonstrate that the Circuit Court erred in failing to account for (among other actions): (1) Appellees Todd and Phillip Parriott and his co-conspirators transacted extensive business in Maryland and derived substantial revenue (i.e. over \$3.6 Million) from Appellants through these business transactions (E274-E356), (2) Appellee Todd Parriott placed numerous phone calls into Maryland for the purpose of soliciting business from Appellants, inducing them to take out a \$2 Million mortgage on their property located in St. Mary's County (E274-E298),<sup>1</sup> (3) Appellee Todd Parriott and his co-conspirators submitted contract documents for signature in Maryland (E345-E346), (4) Appellants submitted \$2 million dollars for investment in the Midbar development in which Phillip Parriott has been shown to have an interest, and (5) Phillip Parriott was a manager of Consolidated Mortgage Corporation \*2 - the company that solicited business in the state of Maryland and received millions of dollars in revenue from Appellants (E358). Therefore, Appellants clearly directed the Circuit Court to a mountain of evidence showing “continuous and systematic activities” of Appellees Parriott in Maryland.

Further, Appellees Parriott offer no opposition or rebuttal to addition arguments made by Appellants that establish personal jurisdiction in Maryland. Indeed, Appellees offer no response to the Conspiracy Theory of Jurisdiction articulated in Sections II(B) and III(A) of Appellants' brief that would clearly establish personal jurisdiction for this matter in Maryland based upon the Maryland Court of Appeals' ruling in *Mackey v. Compass Mktg.*, 391 Md. 117, 121 (Md. 2006). Next, Appellees Todd and Phillip Parriott offers little to no rebuttal to personal jurisdiction in Maryland based upon the “substantial revenue” test articulated by Appellants in Sections II(C) and III(B) of Appellants' brief that would clearly establish personal jurisdiction for this matter in Maryland based upon the Maryland Court of Appeals' ruling in *Lamprecht v. Piper Aircraft Corp.*, 262 Md. 126, 132 (Md. 1971). Moreover, Appellee Todd Parriott offers no response to personal jurisdiction established through Todd Parriott's position as an officer in a Maryland company as articulated in *In re Mid-Atlantic Toyota Antitrust Litigation*, 525 F. Supp. 1265, 1272 (D. Md. 1981) *aff'd*, 704 F.2d 125 (4th Cir. 1983) - even admitting his role in that company. Therefore, personal jurisdiction in Maryland over Appellees Todd and Phillip Parriott can be established in a number of ways that Appellees wholly failed to rebut in their brief.

\*3 Finally, Appellees Todd and Phillip Parriott provide no rebuttal to the Circuit Court's clear error in failing to allow for discovery to determine the full extent of both Appellees' connections to Maryland as required by *Androustos v. Fairfax Hosp.*, 323 Md. 634, 639 (Md. 1991). This error by the Circuit Court necessitates reversal all on its own.

Therefore, Appellants maintain that the Circuit Court should be reversed and this matter remanded to the Circuit Court for St. Mary's County, Maryland.

## **II. Appellee Stephenson Fails to Establish That Service Upon Him Was Improper.**

As explained in Appellants' brief, Appellants served Appellee Stephenson in the Circuit Court in three ways: (1) Appellee Stephenson was served with a copy of the Summons and Complaint at his primary address in Henderson, NV in August 2011, (2) Appellee Stephenson's wife was personally served with a copy of the Summons and Complaint in November 2011, and (3) it is undisputed that Appellee Stephenson was served a copy of the Federal Summons and Complaint in December 2011 (E511). Although Appellee Stephenson goes to great lengths to argue that service was defective upon him, the Courts have consistently rejected the deification of "form over substance" interpretation of service of process that Appellee Stephenson contends. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (U.S. 1950); *see also Rajan v. Shepard-Knapp*, 965 S.W.2d 47, 49-50 (Tex. App. Houston 1st Dist. 1998); *see also Edward Hansen, Inc. v. Kearny Post Office Associates*, 399 A.2d 319, 323 (Ch.Div. 1979). Even if this Court were to accept much of Appellee Stephenson's argument on this point - which is contrary to the law - as explained at the end of Section 1(B) of \*4 Appellants' brief, Appellee Stephenson can hardly argue that he was not summoned into the Circuit Court with a "notice and opportunity to be heard" as famously required by Mullane when he accepted service of the Federal Summons and the Complaint attached to it when that very same Complaint was originally filed in the Circuit Court and did not change at all throughout this litigation.

Therefore, Appellee Stephenson's contention that he was not properly served with the Complaint and Summons in Maryland State Court is simply wrong, necessitating the Circuit Court's reversal.

## **III. Appellee Stephenson Fails To Establish That A Federal Summons Is Unenforceable In State Court Upon Remand.**

### **A. Appellee Stephenson's Interpretation Of The United States District Court Of Maryland's Ruling Regarding Personal Jurisdiction As To Appellee Stephenson Is Incorrect.**

First, Appellee Stephenson mischaracterizes the US District Court of Maryland's ruling on personal jurisdiction in order to support its meritless position. Appellee Stephenson contends that "[i]n remanding the case back to State court, Judge Chasanow held that there was no longer a basis to exercise personal jurisdiction as the RICO claim was dismissed. (E190)." *See* Appellee Stephenson's brief at 13. Appellee Stephenson went on to state: "...Judge Chasanow...remanded the case to State court to determine whether personal jurisdiction existed under Maryland long arm statutes (sic). (E190, fn. 14)." *See* Appellee Stephenson's brief at 13. The portions of the ruling cited by Appellee Stephenson do not state what Appellee Stephenson contend that they state. Rather, Judge Chasanow holds:

\*5 Considering that this case is still in its early stages, it is appropriate to decline to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims. Instead, those claims will be remanded to the Circuit Court for St. Mary's County for further consideration. <sup>14</sup>

## **V. Conclusion**

For the foregoing reasons, the motion to set aside the default entered against the Andrews Defendants will be granted; the motion to strike Defendant Kerry Stephenson's affirmative defenses will be denied as moot; the motions to withdraw as counsel filed by the attorney for Defendants Todd and Phillip Parriott will be granted; and the motions to dismiss Plaintiffs' complaint filed by the Parriott Defendants will be granted in part and denied in part. Plaintiffs' RICO count will be dismissed as to all defendants, and the case will be remanded to state court. A separate order will follow.

\*6 (E189-190). In the US District Court Memorandum Opinion, Judge Chasanow made her ruling regarding "the basis to exercise personal jurisdiction" and "whether personal jurisdiction existed under the Maryland long-arm statute" as to the *Parriott Defendants* in fn. 14 of the Opinion (E190), *not* Appellee Stephenson as suggested by him. Indeed, Appellee Todd and Phillip Parriott contested personal jurisdiction at the US District Court in Motions to Dismiss while Appellee Stephenson filed no such

Motion to Dismiss, but instead filed an Answer and an Amended Answer in the US District Court that were both silent as to any purported lack of personal jurisdiction or insufficient service of process and therefore waived. *See Md. Rule 2-322(a)*; *see also Hariri v. Dahne*, 412 Md. 674, 683 (Md. 2010) (“[A]n argument for ‘dismissal for lack of jurisdiction’ is waived unless it complies with *Md. Rule 2-322(a)*, which requires that the defense of ‘lack of jurisdiction over the person’ be asserted ‘by motion to dismiss filed before the answer,’ and which provides that, ‘[i]f not so made and the answer is filed, [that defense is] waived.’”); *see also Hernandez v. Hernandez*, 169 Md. App. 679, 687 (Md. Ct. Spec. App. 2006); *see also Fed. R. Civ. Pro. 12(b)*.

Therefore, Appellee Stephenson's characterization of the United States District Court opinion does not comport with the actual findings of that Court and offers no support for the positions that Appellee Stephenson takes in his brief.

#### **B. Appellee Stephenson Repeatedly Cites Outdated Jurisprudence Regarding The Effect Of Federal Pleadings Upon Remand To State Courts To Support Its Meritless Position.**

Appellee Stephenson articulates a position that is contrary to jurisprudence in the area of validity of federal pleadings upon remand to state court - an issue of first \*7 impression in Maryland. Indeed, in support of its position, Appellees frequently cite to *Tracy Loan & Trust Co. v. Mutual Life Ins. Co.*, 79 Utah 33 (Utah 1932), *Citizens' Light, Power & Telephone Co. v. Usnik*, 26 N.M. 494 (N.M. 1921) and a host of cases from state and federal courts that *preceded* both *Tracy Loan & Trust Co.* and *Usnik*. As the Supreme Court of New Hampshire explained in 2009 in *State v. Hess Corp.*, the host of cases that Appellee Stephenson relies upon, and their predecessors, are outdated due to changes in the federal removal statute that occurred in 1948. 159 N.H. 256, 261-262 (N.H. 2009). *See* Appellants' brief at p. 15. Since 1948, the overwhelming trend in jurisprudence has been to recognize the validity of federal pleadings after remand for the wide variety of policy considerations cited by the Court in *Hess Corp.* and articulated by Appellants in Section I(C)(1) of their brief.

The only cases that Appellee Stephenson cites in support of its position after the changes to the federal removal statute that occurred in the late 1940s are both inapposite. The first case that Appellee Stephenson cites is *Pickford v. Kravetz*, a case from New York that was incorrectly removed from state court to federal court but concerns the validity of service upon a third-party defendant upon remand instead of a named defendant such as the instant matter. 206 Misc. 539, 539-541 (N.Y. Sup. Ct. 1954). The other case that Appellee Stephenson cites is *Levine v. Lacy* from Virginia that concerns a default by defendant in Virginia state court and the rigid rules regarding the filing of a responsive pleading in Virginia state court or else “suffer the consequences” of default at the discretion of the state court. 204 Va. 297,301 (Va. 1963). Both cases cited by Appellee Stephenson are easily distinguished and clearly immaterial to the instant matter.

\*8 Therefore, Appellee Stephenson offers this Court no reason to rule contrary to the majority trend in jurisprudence in this area of the law, necessitating the reversal of the Circuit Court.

#### **IV. Appellants' Appeal Is Not Premature Under Maryland Law.**

This Court in *McCormick Constr. Co. v. 9690 Deercro Rd. Ltd. Partnership* stated:

An appealable judgment is one that must be so final as to determine and conclude rights involved, or deny the appellant means of further prosecuting his rights and interest in the subject matter of the proceeding.

79 Md. App. 177, 182 (Md. Ct. Spec. App. 1989). *See also Fred W. Allnutt, Inc. v. Commissioner of Labor & Industry*, 289 Md. 35, 40 (Md. 1980) (“In general, the cases hold that a judgment or order of a court is appealable if it is so final as to deny the appellant the means of further prosecuting... his rights and interests in the subject matter of the proceeding.”).

In this matter, Appellants are **elderly** residents of St. Mary's County who are **eager** to proceed with this appeal. For the reasons set forth below, the instant appeal “conclusively” resolved the rights between the parties and Appellants are denied the means of further prosecuting their rights and interests in the subject matter of this proceeding.

**A. Maryland Law Provides For This Appeal Despite Claims Remaining Against Named Defendants Who Have Not Been Served.**

The Maryland Court of Special Appeals in *Tidewater Ins. Assocs. v. Dryden Oil Co.* stated that Md. Rule 2-602 will not deprive this court of jurisdiction where a \*9 judgment has been rendered but claims remain against defendants who have not been served. 42 Md. App. 415, 418-420 (Md. Ct. Spec. App. 1979). See also *State Highway Admin. v. Kee*, 309 Md. 523, 529 (Md. 1987) (stating: "...a named defendant who has not been served is not a party for the purpose of determining finality of a judgment.") (emphasis added). *Burns v. Scottish Dev. Co.* also stated:

The record in this case contains no Rule 2-602(b) certification from the circuit court. Nevertheless, the Court of Appeals has previously held that Rule 2-602 will not deprive an appellate court of jurisdiction where a final judgment has been rendered but claims remain against defendants who were not served...*In other words, the appellant will not be penalized for the circuit court's lack of jurisdiction over one or more defendants.*

141 Md. App. 679, 690 (Md. Ct. Spec. App. 2001) (emphasis added) (internal citations omitted). Here, Defendants Nicholas Andrews, N. Andrews LLC, Sean Zausner, David Zausner and David Feingold have not been served and therefore would not be considered a party for the purpose of determining the finality of the judgments for appellate review against Appellees Todd Parriott, Phillip Parriott and Kerry Stephenson according to *Kee*, *Burns* and *Tidewater Ins. Assocs.*

Therefore, the remaining un-served Defendants would not deprive the Maryland Court of Special Appeals from jurisdiction over the timely appeals by Appellants of the Circuit Court's judgments as to Appellees Todd Parriott, Phillip Parriott and Kerry Stephenson.

**\*10 B. Appellants Are Precluded From Further Pursuit Of This Matter In The Circuit Court Because The Remaining Defendant Is In Bankruptcy And Protected By An Automatic Stay.**

A remaining party to this matter, Defendant Desert Capital REIT, Inc., has been served by Appellants but Appellants remain prohibited from seeking relief from Defendant Desert Capital REIT, Inc. - a Maryland company that lists Appellee Todd Parriott as a corporate officer (E386-E427) - because it remains subject to the Automatic Stay that it filed with the Court on October 24, 2011.

Indeed, 11 USCS § 362(a)(1) specifically prohibits Appellants from continuing this action against Defendant Desert Capital REIT, Inc. while this stay is in place: "...a petition filed...operates as a stay, applicable to all entities, of the...continuation...of process...of a judicial...action...to recover a claim against the debtor that arose before the commencement of the case under this title." 11 USCS § 362(a)(1).

Here, Appellants are prohibited by law from pursuing further action against Defendant Desert Capital REIT, Inc. because the automatic stay remains in place. As such, Appellants have been effectively denied the means of further prosecuting their rights and interests in the subject matter of this proceeding.

**CONCLUSION**

For both the foregoing reasons and the reasons cited by Appellants in their brief, Appellants request that the Court of Special Appeals reverse the Circuit Court's Order granting Appellees' Motions to Dismiss and reverse and remand for further proceedings.

**Appendix not available.**

Footnotes

- 1 Appellee Todd Parriott's assertion on p. 13 of his brief that Appellant Israel Swarey placed only "a phone call from Maryland to Todd Parriott in Nevada" is demonstrably the opposite of the truth.
- 14 Because the RICO count will be dismissed, there also will no longer be a basis for exercising pendent personal jurisdiction over the Parriott Defendants as to the state law claims, necessitating an analysis of personal jurisdiction under Maryland's long-arm statute. See *D'Addaric*, 264 F.Supp.2d at 387-88 (E.D.Va. 2003) (explaining that if the federal claim(s) providing the basis for pendent personal jurisdiction "should be dismissed" at a later time, "the state claims against that defendant would also have to be dismissed, unless another basis for asserting personal jurisdiction exists"). In light of the decision not to exercise supplemental subject matter jurisdiction over the state law claims and to remand the case, that issue is not reached.

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